IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1932.

L. M. DAKIN (Successor to A. M. Anderson), as Receiver of the First National Bank of St. Petersburg,

PETITIONER,

versus

TAVER BAYLY, as Liquidator of the Peoples Bank of Clearwater,

RESPONDENT.

Petition for Writ of Certiorari to the United States Circuit Court of Appeals of the Fifth Circuit.

To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your petitioner, L. M. Dakin, as Receiver of the First National Bank of St. Petersburg, by direction of the Comptroller of the Currency of the United States, respectfully submits his petition for writ of certiorari to review the judgment of the United States Circuit Court of Appeals from the Fifth Circuit in the

above entitled case of March 4, 1933. The Circuit Court of Appeals for the Fifth Circuit has affirmed the judgment of the District Court of the United States in and for the Southern District of Florida, Tampa Division. The matters involved are as follows:

The First National Bank of St. Petersburg acted as collecting agent in St. Petersburg, Florida, for Peoples Bank of Clearwater, of Clearwater, Florida, which forwarded checks on St. Petersburg banks deposited with it by its customers, and Peoples Bank of Clearwater acted as collecting agent in Clearwater for the First National Bank of St. Petersburg for checks on Clearwater banks. The First National Bank of St. Petersburg failed June 9, 1930, with collections in hand for Peoples Bank of Clearwater amounting to $2898.40. At the same time Peoples Bank of Clearwater held collections for First National Bank of St. Petersburg amounting to $2631.30. Peoples Bank of Clearwater retained this amount as a set-off against the collection made by the First National Bank of St. Petersburg.

A. M. Anderson, the former Receiver of the First National Bank of St. Petersburg, took the position that the collections made by the two banks belonged to their customers respectively and were not subject to set-off. Suit was brought by A. M. Anderson, as Receiver of the First National Bank of St. Petersburg, against Peoples Bank of Clearwater, in the District Court of the United States in and for the Southern District of Florida, Tampa Division. The set-off was

pleaded. Subsequently the Peoples Bank of Clearwater became insolvent and was placed in the hands of Taver Bayly, as Liquidator, by the Comptroller of the State of Florida. Thereafter, judgment was entered in the District Court allowing the set-off and this judgment was affirmed by the Circuit Court of Appeals. A. M. Anderson resigned as Receiver of the First National Bank of St. Petersburg and your petitioner was duly appointed and qualified as Receiver to succeed the said A. M. Anderson, and is now acting as such.

The question presented to and decided by the District Court and affirmed in its opinion by the Circuit Court of Appeals of the Fifth Circuit was, that conceding the title of the checks sent to the First National Bank of St. Petersburg by Peoples Bank of Clearwater to be in its depositors, this was a matter of no concern to the Receiver of the First National Bank of St. Petersburg and the set-off should be allowed to Peoples Bank of Clearwater. The reasons why a writ of certiorari should be granted in this case are,

(a). The decision of the Circuit Court of Appeals is in conflict with the decision of (1) the Circuit Court of Appeals of the Eighth Circuit in the case of Hirning v. Federal Reserve Bank of Minneapolis, 52 Fed. (2d) 382; (2) the Circuit Court of Appeals of the Fourth Circuit in the case of Federal Reserve Bank of Richmond v. Early, 30 Fed. (2d) 198; (3) the Supreme Court of the United States in the case

of Early v. Federal Reserve Bank of Richmond, 281 U. S. 88.

(b). The decision is on an important question of general law and is in conflict with the weight of authority.

Wherefore, your petitioner respectfully prays that a writ of certiorari issue under the seal of this court directed to the United States Circuit Court of Appeals for the Fifth Circuit, commanding said court to certify and send to this court a full and complete transcript of the record and of the proceedings of the Circuit Court of Appeals had in said cause to the end that this cause may be reviewed and determined by this Honorable Court as provided by the statutes of the United States, and that the judgment herein of said Circuit Court of Appeals be reviewed by this Honorable Court, and for such further relief as to this court may seem proper.

L. M. DAKIN,
Petitioner.

DONALD C. McMULLEN,
Counsel.

UNITED STATES OF AMERICA,
STATE OF FLORIDA,
COUNTY OF PINELLAS:

Before the undersigned authority personally ap-

peared L. M. Dakin, who, first being duly sworn, deposes and says, that he is the petitioner in the foregoing proceeding, that he has read the foregoing petition, and the same is true as he verily believes.

L. M. DAKIN.

Sworn to and subscribed before me this the 12th day of April, 1933.

SUSAN M. HALLOWELL,
Notary Public, State of Florida at Large.
My Commission expires Nov. 3, 1933.

SUPPORTING BRIEF.

The sole question to be determined in this case is, whether a forwarding bank can use the indebtedness due upon the checks of its depositors as a set-off against its collecting correspondent where the checks deposited do not become the property of the forwarding bank.

It is admitted in this instance that under the laws of Florida, Section 6834, Compiled General Laws, the title to the checks set off by Peoples Bank of Clearwater was in its depositors.

Federal Reserve Bank of Richmond v. Malloy, 264 U. S. 160.

Edwards v. Lewis, 98 Fla. 956; 124 So. 746.

City of Miami v. First National Bank of St. Petersburg, 58 Fed. (2d) 562.

To permit Peoples Bank of Clearwater to use the checks forwarded for collection as a set-off enables it to secure payment in full for its customers, thereby giving such customers an unfair advantage to the detriment of other creditors of the insolvent First National Bank of St. Petersburg and contrary to the laws of the United States which contemplate a ratable distribution of the assets of banking associations organized under the laws of the United States.

U. C. Code, Title 12, Section 194.

Davis v. Elmira Savings Bank, 161 U. S. 27.

The use as a set-off of checks deposited for collection against a liability of the bank in which they were deposited was disapproved by the Circuit Court of Appeals of the Eighth Circuit in Hirning v. Federal Reserve Bank of Minneapolis, 52 Fed. (2d) 382. In Federal Reserve Bank of Richmond v. Early, 30 Fed. (2d) 198, the Circuit Court of Appeals of the Fourth Circuit said:

> "We do not think the Reserve Bank has the right to set off the balance due by the insolvent on the checks against its stock liability. . . . A set-off of checks held for collection against a liability would not be allowed for the reason, that demands to be set off against each other must be mutual; that is they must be due to and from the same parties and in the same capacity."

This decision was affirmed in Early v. Federal Reserve Bank of Richmond, 281 U. S. 88.

The same principle is enunciated in Bank of Metropolis v. New England Bank, 47 U. S. 212.

The weight of authority is that a set-off can not be sustained unless the party seeking to obtain the benefit of the set-off is the real owner and has the control of the counter claim.

McGraw v. Pettibone, 10 Mich. 530.

McDade v. Meade, 18 Ala. 214.

Olmstead v. Scutt, 55 Conn. 125.

Ryder v. Ellis, 241 Mass. 50.

McDonald v. Harrison, 12 Mo. 447.

34 C. J. 710-11.

Waterman on Set-Off, 2nd Ed., Sec. 59.

It is respectfully submitted that the writ of certiorari should issue.

DONALD C. McMULLEN,
Counsel.
Tampa, Florida.